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1 RECORD OF ORAL HEARING  
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3 UNITED STATES PATENT AND TRADEMARK OFFICE  
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5  
6 BEFORE THE BOARD OF PATENT APPEALS  
7 AND INTERFERENCES  
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10 *Ex parte* ANNE FARBROT and INGRID GUSTAFSSON  
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13 Appeal 2008-4799  
14 Application 10/800,176  
15 Technology Center 3700  
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17  
18 Oral Hearing Held: February 11, 2009  
19

20  
21 Before ERIC GRIMES, RICHARD M. LEOVITZ and  
22 FRANCISCO C. PRATS, *Administrative Patent Judges*,  
23

24 ON BEHALF OF THE APPELLANTS:  
25

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31

32 The above-entitled matter came on for hearing on Wednesday,  
33 February 11, 2009, commencing at 2:58 p.m., at the U.S. Patent &  
34 Trademark Office, 600 Dulany Street, Alexandria, Virginia, before  
35 Christine L. Loeser, Notary Public.

1 PROCEEDINGS

2 JUDGE GRIMES: Good afternoon. You have 20 minutes and you  
3 can start whenever you are ready.

4 MR. BOONE: Just as a broad overview for this application, this  
5 rejection, is that the Examiners relied on two components that have a very  
6 similar name, but they have very different physical structures, very different  
7 functions, and then it is asserted to modify one for the other.

8 Essentially, as a bullet point for this, is a similar name does not beget  
9 obviousness. Jumping to sort of the details of this is we have a primary  
10 reference which is Roe. That's a diaper with a lotioned top sheet. The lotion  
11 has two key ingredients, an emollient and an immobilizing agent.

12 Roe is very clear in expressing that both the emollient and the  
13 immobilizing are key ingredients. Column 10, lines 33 to 36, Roe expresses  
14 the emollients, a key active ingredient in the lotion, and that the purpose of  
15 the emollient is essentially to soften, soothe, supple, coat, lubricate, so forth,  
16 the skin.

17 The function of that emollient, of course, is, as I said, is to soothe the  
18 skin, and it transfers to the skin.

19 As an example of an emollient, Roe gives a polysiloxane. What the  
20 polysiloxane in Roe is is a linear chain, and it has a composition or structure  
21 that is basically going to make it function essentially as an oil or cream.  
22 With this oil or cream, it's going to transfer to the skin.

23 The Examiner said, you have that emollient and I'm going to  
24 substitute it with a different emollient. It looks to the reference Lin. Lin  
25 does teach a polysiloxane, but it's a very, very different substance.

1           It's an elastomeric cross-linked polysiloxane gel. It's something that is  
2 going to essentially stay intact on the surface of the article it is applied to. It  
3 is not going to transfer to the skin, and it does not have, in that regard, a  
4 soothing effect or moisturizing effect on the skin.

5           I believe the Examiner has admitted to it, and if nothing else, it's on  
6 page 7 in the Examiner's Answer and discussed in detail in my Reply Brief,  
7 that I think there is agreement with the function of the polysiloxane gel.

8           So the combination or the modification the Examiner is making is  
9 they are taking the emollient from Roe and substituting the polysiloxane gel  
10 of Lin.

11          Roe has been very clear in expressing that this emollient is a very key  
12 ingredient. I assert that you can't take away a key ingredient and replace it  
13 with an ingredient that functions differently. It just doesn't make sense.

14          One skilled in the art wouldn't take this emollient, this polysiloxane  
15 from Roe that is an oil or cream and is transferring to the skin to soothe it  
16 and substitute it with a different polysiloxane that doesn't do any of those  
17 features.

18          JUDGE PRATS: That is the idea that is expressed -- I'm looking at  
19 column 13 of Lin at the bottom there -- where they give a whole bunch of  
20 different uses for the gel.

21          For example, you can improve the properties of skin creams, skin care  
22 lotions, et cetera, moisturizers and so forth. Would you care to comment on  
23 that?

24          MR. BOONE: Sure. Those are talking about, when you use the  
25 polysiloxane here -- it's in Lin -- it's a carrier that is releasing something else  
26 or it is a part of another moisturizer.

1           So the polysiloxane itself in Lin is not the moisturizer. It is something  
2 that will either be a part of a moisturizer or will release another active  
3 substance.

4           JUDGE PRATS: Right. But there's a lotion on the top sheet of the  
5 Roe diapers, correct?

6           MR. BOONE: Correct. I guess what you are doing here is you are  
7 taking -- you would take this entire lotion of Lin, let's say, and Lin has this  
8 lotion that is universally applied. It is not going to work on an absorbent  
9 article.

10          Lin is never using it on an absorbent article. These lotions are, as they  
11 are with a polysiloxane gel, as they are described in Lin, are going to block  
12 absorbency. They essentially get in the way of the article from functioning  
13 as it's claimed, which is -- it's claimed as an absorbent article.

14          The Examiner has made a couple of other points I would like to  
15 address, essentially saying -- the Examiner points out that the Lin  
16 polysiloxane gel is transferring an active ingredient. Lin is very explicit in  
17 saying that that active ingredient is not an oil.

18          You can turn to column 2, line 17 to 20 of Lin, and again at column 7,  
19 lines 14 to 17, and in those sections, Lin is very explicit. I am just reading  
20 directly from it. Thus the active ingredient is not the oil and the oil is not the  
21 active ingredient.

22          So with the modification that is being proposed, you are never putting  
23 something that is going to transfer the soothing oil on to Roe.

24          And then something else that the Examiner has overlooked with this  
25 combination --

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Application 10/800,176

1 JUDGE LEBOVITZ: Just to go back to that point, the reason why  
2 Lin -- is that Lin or Roe we were talking about?

3 MR. BOONE: Lin is the polysiloxane gel. What we were talking  
4 about, yeah.

5 JUDGE LEBOVITZ: The oil phrase.

6 MR. BOONE: Yeah.

7 JUDGE LEBOVITZ: The reason why he is saying it is not the active  
8 ingredient is he is trying to just distinguish it between other active  
9 ingredients that are described, because when you look at what he talks about  
10 as an oil, the oil can be leaf oil, jasmine, perfumes.

11 So clearly, it can have an activity. He is just saying it's not the active  
12 ingredient such as the antimicrobial agents that are disclosed in that.

13 MR. BOONE: Right. But essentially, the Examiner, it seemed to  
14 me, was using that as a hook to draw it in where I don't think that hook was  
15 proper.

16 JUDGE GRIMES: I'd like to go back to something I think you said  
17 earlier as well. I think you said if you put the lotion that Lin talked about,  
18 you used the lotion of Lin as the emollient in Roe, that it would block the  
19 absorbency of the diaper?

20 MR. BOONE: Yes.

21 JUDGE GRIMES: But Roe says that emollients useful in the present  
22 invention can be petroleum based, including mineral oil and petrolatum, also  
23 known as mineral wax, petroleum jelly, mineral jelly. Wouldn't those have  
24 the same effects?

25 MR. BOONE: When you are getting to the polysiloxane gel itself,  
26 that's something that doesn't transfer.

1 I think when you have the other sort of -- other petroleum base, a lot  
2 of those, they are just applied very lightly to the top surface. Roe discusses  
3 that, the top sheet of the diaper.

4 The way they are applied, they are made to transfer up. As soon as  
5 you put it essentially on the skin, it transfers across and you don't get this  
6 blockage, whereas the polysiloxane gel is made to not transfer.

7 JUDGE GRIMES: All right.

8 MR. BOONE: Again, the Examiner's combination, I guess, is  
9 replacing the composition of Roe, the lotion which is an emollient and an  
10 immobilizing agent, taking away that emollient and replacing it with the  
11 polysiloxane gel of Lin.

12 So now you have the polysiloxane gel of Lin and an immobilizing  
13 agent. And that combination is also something that one skilled in the art is  
14 not going to do.

15 You sort of have two things that are immobilizing. There's no need to  
16 do that and you run the risk of sort of the immobilizing agent and the  
17 polysiloxane gel at the same time, creating too much of a barrier and not  
18 allowing any active agent to be released or other issues related to that.

19 It really seems the Examiner is focused on this, the fact that they are  
20 both polysiloxanes and that they should be, because the names are similar,  
21 substitutable, and they just aren't. The emollients and the polysiloxane in  
22 Roe does a different function than the polysiloxane of Lin. You can't  
23 substitute a key ingredient with something that does something different.

24 I'll be happy to answer further questions.

25 JUDGE GRIMES: I don't think we have more questions. Thank you  
26 for coming in.



1           MR. BOONE: Thank you.

2           (Whereupon, the proceedings at 3:09 p.m. were concluded.)

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